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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 907

N.V. HANDELSBUREAU LA MOLA,

Petitioner,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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N.V. HANDELSBUREAU LA MOLA,

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ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner N.V. Handelsbureau La Mola, plaintiff-appellant in the proceedings below, prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at F.2d , 30 U.S. L. W. 2373, and is set out in App. A, pp. a1-a9, *infra*. The United States District Court for the District of Columbia rendered no opinion.

Jurisdiction

The judgment herein of the United States Court of Appeals for the District of Columbia Circuit, vacating an Order of the United States District Court for the District of Columbia, and remanding the cause with directions to dismiss the complaint, is dated and was entered February 1, 1962. It is set out in App. B, pp. a10-a11, *infra*. The Order of the United States District Court for the District of Columbia, dated and entered March 30, 1961, is set out in App. B, pp. a11-a12, *infra*. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. §§1254(1) and 2101 (e).

Questions Presented

1. Whether, *after* the enemy occupation of allied or American territory has been terminated, a corporation organized in such territory before the occupation is, by reason of such former occupation of the place of its incorporation, an "enemy" within the meaning of §2(a) of the Trading with the Enemy Act, 40 Stat. 411, as amended, Tit. 50 App. U.S.C. §1 *et seq.*, having, as such, no standing to sue under §9(a) of such Act for the recovery of property which had been seized and vested under §§7(c) and 5(b)(1) thereof *after* the enemy's occupation of such territory had been terminated.

2. Whether the enemy's occupation of allied or American territory during the course of a war, so strips corporations and residents of such territory of the protection of the Fifth Amendment to the United States Constitution with respect to their property

within the United States, that *after* the occupation has ended, and so long as the state of war, or the Executive's right to exercise the war powers continues, such property may be seized and *confiscated* as enemy property.

Statutory and Constitutional Provisions Involved

The statutory provisions involved are those of §2(a), 5(b)(1), 7(c) and 9(a) of the Trading with the Enemy Act, 40 Stat. 411, as amended, Tit. 50 App. U.S.C. §§2(a), 5(b)(1), 7(c) and 9(a), the pertinent texts of which are set out in App. C, pp. a13-a16, *infra*.

The Constitutional provision involved is the Fifth Amendment to the United States Constitution, the pertinent text of which is set out in App. C, p. a16, *infra*.

Statement

The petitioner is a corporation which was organized under the laws of the Netherlands in 1935. R 17a, 29a. By an order dated December 15, *1950*, issued January 8, *1951*, the respondent's predecessor seized and vested in himself, pursuant to §§5(b)(1) and 7(c) of the Trading with the Enemy Act, as amended, and certain executive orders promulgated thereunder, dollar credit balances of the petitioner in four accounts at New York banks. Three of such credit balances antedated the German invasion of the Netherlands on May 10, 1940, and the amendment on that date of Executive Order No. 8389, 5 F.R. 1400, 1677, to include the Netherlands as a "foreign country designated in this Order". The fourth was acquired sub-

sequent to December 23, 1948, more than three years after the German occupation of the Netherlands had been ended. R 4a, 5a, 8a-12a. See p. 9, *infra*.

The petitioner filed a timely notice of claim with the respondent's predecessor for the return of its property under §32 of the Trading with the Enemy Act, as amended, Tit. 50 App. U.S.C. §32, providing for the administrative return of seized and vested property in certain cases. The respondent's predecessor noticed no hearing, and made no determination of the petitioner's claim on its merits, but disallowed it for the reasons set out in his letter of January 10, 1953, to the petitioner, R 103a-104a, as follows:

> Enclosed is the Order disallowing the above-numbered claim.
>
> For your information, it is the present practice of this Office, except in cases where a claim is clearly entitled to allowance, to remit the claimant whose right to sue is not barred by lapse of time to his remedy in court and thus avoid the possible delay and expense of a double set of hearings. Such procedure is authorized by an amendment to the Rules of Procedure for Claims of this Office, effective April 16, 1957 (22 F.R. 2656).
>
> Under the provisions of Section 33 of the Trading With the Enemy Act, as amended (50 U.S.C. App. 33), a timely suit may be instituted under Section 9(a) of the Act for return of the property claimed in the event you are dissatisfied with the administrative action taken on your claim, and the enclosed order of disallowance does not prejudice in any way your right to sue.

The petitioner thereupon commenced this timely action under §9(a) of the Act. After answer, the respondent moved for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, on the ground that the petitioner was an "enemy" with no standing to sue under §9(a) of the Act because during the period of Germany's occupation of the Netherlands while Germany and the United States were at war, petitioner was both a Netherlands corporation and was doing business in that country. R. 15a-16a. The District Court granted the motion.[1] App. B, pp. a11-a12, *infra*. In vacating the District Court's order and directing that the complaint be dismissed, the Court of Appeals relied *solely* on the undisputed facts that the petitioner had been incorporated in the Netherlands, and that the Netherlands was occupied by Germany while Germany was at war with the United States, wholly without reference to any alleged engagement in business by the petitioner in the Netherlands during such occupation. App. A, pp. a1-a9, *infra*.

[1] Although the petitioner asserted additional grounds for his motion and the District Court did not indicate the basis of its decision, the circumstances are such as to leave no room for doubt but that the motion was granted on the ground set out in the text. Thus, in a brief submitted to the Court below on or about November 7, 1961, in *Kennedy, Attorney General* v. *Christiani*, No. 16364, the respondent here said at page 6:

> We * * * invite the Court's attention to *N.V. Handelskwekerij La Mola* v. *Kennedy*, now pending on appeal in this Court, No. 16417. In that case the District Court * * * held that a corporation, incorporated in and doing business in the Netherlands while it was occupied by Germany (and Germany was at war with the United States) was an enemy and did not shed this enemy status with * * * the termination of the German occupation. The vesting order, in that case, was issued on December 15, 1950 * * *.

The reference is, of course, to the decision of the District Court in this case. A copy of such brief has been lodged with the Clerk of this Court.

In construing the definition of "enemy" in §2(a) of the Act as applying to petitioner because of its incorporation in the Netherlands and the enemy's occupation of the Netherlands during the war, and in holding, in consequence, that the petitioner was barred from maintaining this action to recover property which had been seized and vested *after* the German occupation of the Netherlands had ended, the Court below said, App. A, p. a5, *infra:*

> * * * the definition of enemy in section 2 of the Act, as one who is "resident within the territory (including that occupied by the military * * * forces) of any nation with which the United States is at war" or "incorporated within such territory" * * * is to be construed as including a person who or a corporation which, at the time of the vesting order, is one who *has been* a resident of an enemy occupied nation during its occupation or was *then* incorporated under the laws of an occupied territory * * *. [Emphasis supplied][2]

The Court below gave as its reasons for so holding that, App. A, p. a4, *infra:*

> The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during * * * enemy occupation. Property subject thereto during an occupation is available to control of the enemy in aid of its warfare against the United States and its allies. However, actual

[2] Certainly since the petitioner was not newly incorporated in the Netherlands *during* the occupation, by the last phrase the Court below must necessarily be understood to have meant, "or was, during the enemy occupation of a nation, a corporation [which had been] incorporated under the laws of such nation".

vesting *might* not then be possible. For example, the Custodian *might* not discover the property during the period of enemy occupation or, if discovered during such period, investigation *might* entail a considerable period of time before a determination is made that the property is owned or controlled by an enemy within the meaning of section 2 and therefore subject to seizure. Its usefulness to the enemy is not thereby obviated. Rather the contrary. Yet to immunize it because for some reason the vesting authority failed to reduce it to possession until hostilities have ceased, or the occupation ended, would leave untouched property which had been available to enemy control. *Such immunization would also deprive the United States of valuable means of supporting its own war efforts. Those efforts, and the heavy responsibilities consequent upon a war, persist long after hostilities have ceased and occupied countries have been freed of the enemy.* [Emphasis supplied]

In holding that the petitioner was unprotected by the Fifth Amendment, the Court said, App. A, p. 46, *infra:*

> It is suggested that the construction of "enemy" we adopt, and which has the result of enabling the United States to retain appellant's property without compensation, raises constitutional doubts under the Fifth Amendment. It is urged, therefore, that we should adopt a more limited construction which would preclude the confiscation of appellant's property. If, however, we are right in the reasons we have advanced in support of the construction we give the Act

> that is, the efficacy of this construction in enabling the purposes of the Act to be fulfilled—then the same reasons remove the constitutional doubts. The constitutionality of confiscating enemy property in carrying out the war powers of course is not questioned * * *. A reasonable exercise of this aspect of the war powers permits the United States to reach property located within its borders which was available to or whose owner was under the control of the enemy while resident within occupied territory. To require as a constitutional matter that the property be actually vested during the occupation or before the end of hostilities would create a very substantial limitation upon the economies of warfare.

Neither the petitioner's status as a Netherlands corporation, nor the enemy occupation of the Netherlands, rendered the petitioner ineligible for the administrative return of its property under §32 of the Act. In consequence, the petitioner urged below that since its claim under §32 had been disallowed not on the merits, but solely for reasons of administrative convenience and with the express purpose of remitting the petitioner to its judicial remedy, the respondent should not, in equity and good conscience, be heard to say that the petitioner was without any judicial remedy because it was a Netherlands corporation, and the Netherlands had been occupied by the enemy.[3] The Court below dismissed this contention, saying, App. A, p. a9, *infra:*

> But the question before the District Court was

[3] Section 9(a) of the Act expressly provides that an action thereunder for the recovery of vested and seized property is "a suit in equity". App. C, p. a16, *infra.*

one of jurisdiction. Whatever relief, if any, appellant may seek on the basis of the previous disallowance of its application under Section 32(a), the District Court was without jurisdiction of the complaint in the present case.

World War II began with the German invasion of Poland on September 1, 1939, and the Anglo-French declarations of war against Germany two days later. The Netherlands became involved when invaded by Germany on May 10, 1940. Four days later the Germans razed Rotterdam and occupied the country, but the Netherlands government continued to function in London. Pearl Harbor was attacked on December 7, 1941, and on December 11, the United States and Germany reciprocally declared war against one another. On September 14, 1944, Allied forces landed in the Netherlands, and by May 4, *1945*, the whole country was fully liberated from the Germans. On May 23, *1945*, the Netherlands government was again functioning in The Hague.[4] Some five and a half years later, in December *1950* January *1951*, the respondent's predecessor seized and vested the petitioner's property. The decision of the Court below is that solely because in 1940-1944, when the Netherlands was occupied by the Germans, the petitioner was a Netherlands corporation (as it had been for almost a score of years before, and still is) the petitioner is ineligible under the Act to maintain an action for the recovery of property seized and vested in 1950 1951, and was, even after the occupation had ended, wholly unprotected by the Fifth Amendment

[4] *Information Please Almanac, 1953*, John Kieran, Editor The Macmillan Company 583, 672-9

against the seizure and confiscation of its property as "enemy", so long as the state of war with Germany, or the right to exercise the war powers continued.

This Draconian decision was not reached because the United States and the Netherlands were at war with one another, but despite the historic fact that they were firm and fast allies in a war for survival against a common enemy.[5] Plainly put, the principle announced by the Court below is that under the Act and the Constitution, the United States may take as booty any property in the United States of residents and corporations of an ally, or, indeed, of any part of the United States,[6] which suffered the misfortune to be occupied by the common enemy at any time during any war, and that it may do so even after the enemy has been driven out, until such time as peace may formally be reestablished, and the war powers abrogated.

While the panel which heard the appeal below was unanimous, its decision is not without virtual dissent. Thus, in *Kennedy* v. *Christiani-Onken*, No. 16364, and in *Kennedy* v. *Rommel*, No. 16447, decided March 15,

[5] E.g., a mutual aid agreement was concluded between the two governments on July 8, 1942, 56 Stat. 1554, and on April 30, 1945, they concluded further mutual aid agreements, retroactive to July 8, 1942, relating *inter alia*, to the principles applying to the provision of aid *to the armed forces of the United States*. 59 Stat. 1627.

[6] Section 2(a) defines "enemy" in terms of any individual "of *any* nationality" residing, and "any corporation" organized in the territory of "any nation with which the United States is at war". Such territory is defined as "including *that occupied* by the military and naval forces" of "any nation with which the United States is at war". App. C, p. a13, *infra*. Thus, the holding below would apply with equal force, for example, to all California corporations and residents if California had been occupied by the enemy during the course of the war. Cf. *Korematsu* v. *U.S.*, 323 U.S. 214, 223 (1944); *Hirabayashi* v. *U.S.*, 320 U.S. 81, 86, 94 (1943).

1962, and as yet unreported, the Court below reversed judgments of the District Court, *per curiam*, expressly "on the authority of *N.V. Handelsbureau La Mola* v. *Kennedy*". In both cases Chief Judge Miller concurred in the result only, saying

> While this case was under submission, my brothers here and a third judge handed down a decision in *N.V. Handelsbureau La Mola* v. *Kennedy* which had been heard shortly before the hearing of the present appeal. As I did not participate in that case, I had no opportunity to protest against the decision rendered. Although I do not agree with it, the *Handelsbureau* opinion is a binding precedent which requires reversal here. For that reason only, I concur * * *.

REASONS FOR GRANTING THE WRIT

1. Whether, *after* the enemy's occupation of allied or American territory has been terminated, residents and corporations of such territory are "enemies" within the meaning of §2(a) of the Act, and, as such, without standing to sue under §9(a) of the Act for the recovery of property vested and seized under the Act *after* the enemy's occupation of such territory had been terminated, is an important question of federal law which has not been determined by this Court in the forty-five years since the Act was enacted. During World War I, all of Belgium and Servia and large areas of France, allies of the United States, were occupied by the military forces of our common enemies. During World War II, all of the territories on the European continent of our allies France, Belgium, The Netherlands, Norway, Denmark, Greece and

Yugoslavia, were similarly occupied, as were large areas of British, French, Netherlands, and Chinese territories in Asia. Nor is it to be forgotten that the Philippines, Guam and American territory in the Aleutians, and elsewhere in the Pacific, were also occupied by the enemy. Yet, this Court has never passed on the question whether residents and corporations of allied and American territories once occupied by the enemy, are "enemies" under the Act even *after* such occupation has been ended, so as to leave them without remedy or redress with respect to property seized and vested under the Act *after* the enemy forces had been driven out of the places of their residence or incorporation. Indeed, the decision below is the *only* decision on the question in the forty-five years since the Act was enacted. In *Bank Voor Handel En Scheepvaart N.V.* v. *Kennedy*, 288 F.2d 375 (D.C. Cir. 1961), cert. denied 366 U.S. 962, the seizure and vesting were effected *while* the enemy occupation continued.

In the absence of a remedy to secure return, seizure and vesting under the Act are nothing other than confiscation. The importance of such a question is manifest. It vitally affects basic property rights in the United States of nationals and corporations of our allies and friends, and thus impinges on international relations in both the political and economic fields. It strikes no less at the fundamental right to property of our own nationals and corporations. The complete subversion of such rights is made dependent only on the fortuitous circumstances that the places where the owners of property reside, or were incorporated, had been occupied by the enemy at some earlier time during the war, and that peace has not yet been formally reestablished or the war powers abrogated.

Nor is the importance of the question lessened as World War II recedes into history, for §§2(a), 5(b)(1), 7(c) and 9(a), are "permanent" legislation. *Markham* v. *Cabell*, 326 U.S. 404 (1945), and in this unsettled world none can predict when or where the next war will strike or what territories—ours, no less than our allies'—may be invaded and occupied by the enemy.

The importance of the question is in part indicated, too, by the vast extent of the property in the United States owned during World War II by residents and corporations of but three of our allies whose territories were enemy-occupied during that war. Thus, on June 14, 1941, residents and corporations of France owned $1,040,500,000 of American assets, Netherlands residents and corporations owned $976,700,000 of American assets, and residents of Belgium and corporations organized there owned $312,700,000 of American assets.[7] This case poses the question whether under the Act *all* such property, and considerably more, could be seized and *confiscated* as enemy *after* the enemy occupation of such countries had been ended, so long as the state of war, or the right to exercise the war powers continued. It poses the question, too, in respect of the property of residents and corporations of allied and American territories which may in the future be occupied by an enemy before the final victory is won. In view of its magnitude and the chilling seriousness of its implications, as much for the future as for the present, this question should no longer be left undecided by this Court.

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[7] U.S. Treas. Dept., *Census of Foreign Owned Property in the United States*, (1945), Table III, p. 15; pp. 79, 82, 84.

The construction of §2(a) of the Act urged by the respondent and adopted by the Court below, is that every individual residing in territory, allied or American, during its occupation by the enemy, and every corporation incorporated in territory, allied or American, subsequently occupied by the enemy, is an "enemy" whose property may be vested and confiscated *after* the enemy occupation of such territory has been terminated, so long as the state of war, or the right to exercise the war powers continues. Put otherwise, it is the construction of the Court below that the enemy character which attaches to residents and corporations of territory, allied or American, as the result of its occupation by the enemy, persists even *after* such occupation has been terminated, with the consequence that residents and corporations of territory *formerly* occupied by the enemy are without standing to sue under §9(a) of the Act to recover property which was seized and vested *after* the enemy had been driven out.

The Court below arrived at this construction "in the absence of clearer language indicating the necessity for a different construction", because of its "efficacy * * * in enabling the purposes of the Act to be fulfilled", noting that the "purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during * * * enemy occupation". App. A, pp. a4-a6, *infra*. In support of this position, the Court below cited the following reasons: (1) During enemy occupation, the property of residents and corporations of occupied territory "is available to control of the enemy in aid of its warfare against the United States and its allies"; (2) "actual vesting *might* not * * * be possible" while the enemy's occupation continued, be-

cause "the Custodian *might* not discover the property during the period of enemy occupation", or, if it were discovered, he *might* not have been able to determine until the occupation was over that it belonged to an individual residing, or a corporation organized in occupied territory; (3) the property's "usefulness to the enemy is not * * * obviated" by the failure to seize and vest it during the occupation; and (4) not to seize and vest it *after* the occupation had ended, "would leave *untouched* property which *had been* available to enemy control" and would "*deprive the United States* of valuable means of supporting its own war efforts", the burdens of which "persist long after * * * occupied countries have been freed of the enemy". App. A, p. 44, *infra*.

The utter fallaciousness of the Court's basic assumption, and the complete hollowness of its reasoning are both apparent. The assumption is patently untrue, and the reasoning is plainly specious in regard to the credit balance petitioner acquired more than three years *after* the German occupation of the Netherlands had been terminated. So far as concerns the three credit balances antedating the occupation, they were property in the United States, and property in the United States of residents and corporations of enemy-occupied countries was *not*, during the occupation, "available to control of the enemy in aid of its warfare against the United States and its allies". On the contrary, as a means of "protecting property of persons in occupied countries", and of "preventing the Axis * * * from acquiring any benefit" from property in the United States of such persons, such property was "frozen", i.e., immobilized, by Executive Order 8389, originally promulgated under §5(b) of

the Act on April 10, 1940, 5 F.R. 1400, and amended on May 10, 1940, 5 F.R. 1677, the very day Germany invaded the Netherlands, to include property owned by Netherlands residents and corporations. See, *Zittman* v. *McGrath*, 341 U.S. 446, 448, 451, 453 (1951); *Orvis* v. *Brownell*, 345 U.S. 183 (1953); Reeves, *The Control of Foreign Funds by the United States Treasury* (1945) XI L and Contemp. Prob. 17, 21, 22, 26-29. As Senator Wagner put it, the purpose of "freezing" was to protect the American property of persons in the invaded countries from the consequences of conquest, "from being—to use a very frank word—looted", 86 Cong. Rec. 5006-8 (1940), and the Order's immediate success in "depriving the Axis nations of the use of the dollar assets of countries which they invade" was a matter of some justifiable pride. See, U.S. Treas. Dept., *Administration of the Wartime Financial & Property Controls of the United States Government* (1942) 4, cited in *Propper* v. *Clark*, 337 U.S. 472, 481 (1949); U.S. Treas. Dept., *Annual Report 1942*, 302, 305; U.S. Treas. Dept., *Annual Report 1943*, 125, 126. See also, Brief of United States of America as Amicus Curiae, pp. 4-6, in *Commission for Polish Relief* v. *Banca Nationala*, 288 N.Y. 332, 433 N.E. 2d 345 (1942), discussed at length in *Zittman* v. *McGrath*, *supra*.

Moreover, during the occupation, property in New York of Netherlands corporations, such as that here in suit, was additionally insulated from all possibility of enemy control, and from being of any possible use to the enemy, in consequence of New York's prompt and unequivocal recognition of the efficacy of the Royal Netherlands Decree of May 24, 1940, to vest in the Royal Netherlands Government in London, title

to all assets in New York of Netherlands residents and corporations. *Anderson* v. *N.V. Transandine Handelmaatschappij*, 289 N.Y. 9, 43 N.E. 2d 502 (1942); *State of The Netherlands* v. *Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1953). Certainly, that the three credit balances antedating the German invasion of the Netherlands were still here to be seized and vested *after* the occupation had been terminated, would seem proof sufficient of the wholly imaginary character of their availability and utility to the enemy, on which the Court below relied. But, even if that were not so, the seizure and vesting of such property *after* the occupation had come to an end, could not possibly serve to undo its availability, if any, or to obviate its utility, if any, to the enemy *during* the occupation.

But, more importantly, even if vesting the property of residents and corporations of enemy-occupied territory *after* the occupation had ceased, could conceivably serve to immunize such property *nunc pro tunc* from being available or useful to the enemy, it is *not* necessary to that end to construe §2(a) of the Act as defining as "enemy", corporations and residents of allied and American territory *formerly* occupied by the enemy. For, while under §7(c) of the Act only the property of an "enemy" can be seized, under §5(b)(1) of the Act, the property of "any foreign country or national thereof" may be vested. *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, 486-7 (1947). The distinction between the two is, however, vital. An "enemy" has no remedy for the recovery of his property, with the consequence, perforce, that the seizure of his property *is* confiscation. On the other hand, a "national" of a foreign country

who is not also an "enemy", has a remedy for the recovery of his vested property, which has the effect of making the vesting of his property a form of custodianship. *Clark* v. *Uebersee Finanz-Korporation, supra.*

Certainly, too, it is a slim reed, if reed at all, on which to justify a construction of the Act permitting the Executive to *confiscate* the property of friends and allies after both they and their property "have been freed from the enemy", that to construe it otherwise "would leave *untouched* property which *had been* available to enemy control", even if, indeed, it had been. Nothing in the Act, nor in the nature of things, requires or even suggests that *after* the occupying enemy has been driven from an ally's territories, such property of the ally as has escaped being pillaged by the enemy during the occupation, because it was here rather than at home, is to be "touched", i.e., confiscated, by the United States. It is curious reasoning, too, that the Act is to be construed so as to permit such property to be confiscated, because to hold otherwise "would * * * deprive the United States of valuable means of supporting its own war efforts". The question before the Court below was not whether confiscation is profitable, but whether it is lawful. Neither the Act nor its legislative history indicates any intention on the part of the Congress that the assets in the United States of residents and corporations of allied and American territory, formerly occupied by the enemy, may be confiscated after the occupation has been terminated, in the discretion of the Executive for the aggrandizement of the United States.

There is no question but that under the definition of §2(a), residents and corporations of enemy-occupied territories, allied or American, are enemies, and that their property is enemy property, so long as the occupation continues. The decision of the Court below is that §2(a) of the Act is properly so construed that even *after* the enemy's occupation of a territory, whether allied or American, has been ended, its residents and corporations continue to be enemies, and their property continues to be enemy property, until peace has been formally reestablished or the war powers have been abrogated. But while the language of §2(a) may be lacking in clarity, as the Court below noted, the legislative history of the Act cannot be read other than as "indicating the necessity for a different construction".

Indeed, the Congress clearly considered the remedy of §9 as being available to residents and corporations of territory formerly occupied by the enemy, even with respect to property seized *during* the occupation. Thus, in 1919 the third deficiency appropriations bill * * *, H.R. 3478, 66th Cong., 1st Sess., included a proposed amendment to §9 of the Act, providing for the return by the President, without application therefor, of the vested property of any

> person who was an enemy or * * * solely by reason of residence in * * * the territory of any nation associated with the United States * * * which was occupied by * * * Germany * * * and * * * such person is a citizen * * * of such * * * nation * * *.

When the bill was under consideration in the Senate on July 10, 1919, Senator Underwood, one of its man-

agers, explained this provision as follows, 58 Cong. Rec. 901:

> When the original bill was written, it made an * * * enemy of a man who resided in * * * [enemy] territory. He did not necessarily have to be a German or an Austrian, or in arms against us, but any citizen of the United States or any alien citizen who happened to be residing in Germany or those portions of Belgium and France that were occupied by the German Army, became an * * * enemy for the purposes of the Act. In other words, it gave the Alien Property Custodian power to take possession of his property and hold it, *the purpose being to keep the property or the proceeds of the property or the income from the property from going back into enemy territory.*
>
> * * * *We found that in the enactment of the law this property could be turned back. It gave the right under section 9 to sue to get the property back* * * *. * * * the purpose of this amendment is *merely* to give * * * the President * * * an opportunity where he finds he has taken property from a citizen of the United States or France or Belgium to preserve it and keep it or its income out of the hands of the enemy and turn it back to its rightful owner *without litigation.*
>
> * * * The main object is to facilitate settlements in the case of property that belongs to loyal people, either our own citizens or our allies, without any litigation and without dispute. So the amendment amounts to but very little * * *. The object is to save lawsuits and save costs and rapidly dispose of the matter. [Emphasis supplied]

With this explanation, the amendment carried and was enacted.[8] Thus, it was the Congressional understanding that the remedy provided by §9 for the recovery of seized property by "any person not an enemy or ally of enemy" was available to any individual or corporation who was a citizen of, and had resided in allied territory during its former occupation by the enemy.[9] This understanding, moreover, was wholly in keeping with the views of the previous Congress, which had enacted the Act, and of the Act's draftsman, that the remedy under §9 was available in the wholly indistinguishable case of an American who had *formerly* been resident in enemy or enemy-occupied territory, but who had since removed elsewhere. Thus, on July 11, 1917, while the bill which subsequently became the Act, H.R. 4960, 65th Cong., 1st Sess., was being debated in the House, Representative Mann of Illinois offered an amendment to §9 which would have provided for the administrative return, on application to the Secretary of Commerce, of the vested property of such Americans, and a judicial remedy if the Secretary should fail to grant the application. The following colloquy ensued, 55 Cong. Rec. 4978, 4979:

Mr. Dewalt. After consultation with the gentle-

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[8] Act of July 11, 1919, c. 6, §1, 41 Stat. 35. This provision continued in §9 until that section was further amended by the Act of June 5, 1920, c. 241, 41 Stat. 977, which added subsection (b). The language of the 1919 amendment was deleted at that time because it was considered that the broader scope of subdivision (1) of the new subsection (b) made it superfluous. See H.Rep. 1089, 66th Cong., 2d Sess., 4, 6 (1920).

[9] A "person" is defined in §2(c) of the Act as including any individual * * * or corporation * * *", and a corporation is, of course, deemed to be a citizen and resident of the place of its incorporation. *Bank of Augusta* v. *Earle*, 13 Pet. 573 (1839); *City of St. Louis* v. *Wiggins Ferry Co.*, 11 Wall. 423 (1870); *Cream of Wheat Co.* v. *Grand Forks County*, 253 U.S. 325 (1920).

men in charge of the bill I will say that there is no objection to the amendment of the gentleman from Illinois, but if he desires to explain it—

* * * * *

Mr. Adamson. I would be very glad if the gentleman would make a little explanation of it, *because it occurred to some of us that the matter was already covered by the terms of the bill.*

Mr. Mann. *I will not undertake to be certain that it is not covered already by the terms of the bill.* * * * I do not see how anybody could really object to the provision * * *. If an American now in Germany, and hence an * * * enemy, has his property placed in the hands of the custodian and then he manages to get back to the United States, there is no reason why the money should not be turned over to him.

Mr. Montgue. *When he manages to get back to the United States* * * * *does not his return, ipso facto, remove his enemy character, as if he had never been out of the country?*

Mr. Mann. But his property is in the hands of the custodian and I doubt if there is any way by which he could get it out unless we permit him to make the [administrative] application. [Emphasis supplied]

While the proposed amendment carried in the House at that time, it did not survive to become part of the Act. For, on July 28, 1917, at the Hearing on H.R. 4960 before the Subcommittee of the Senate Committee on Commerce, 65th Cong., 1st Sess., Assistant Attorney General Warren, the draftsman of the bill, testified, pp. 149 *et seq.*, that "the *only* portion of the Mann amendment that contains something that

was not in the original draft of the bill was * * * that he might apply *to the Secretary of Commerce* for a return of the property * * *". Mr. Warren further testified unequivocally that

> where an American citizen was resident in Germany at the time the funds were taken over, and therefore was an enemy at the time, that is, an enemy for the purposes of this Act at the time when the property was taken over, but where he afterwards removed out of Germany; and under those circumstances the Mann amendment gave him a right to sue; *but he would have a right to sue anyway, under the bill as originally drafted, because the moment he moved out of Germany he * * * came within the general provisions of section 9.* [Emphasis supplied]

Thus, the view of the Court below that enemy status under the Act is static and immutable is contrary to the views of its draftsman, of the Congress that enacted it, and of the Congress immediately following, that first amended it. It was their view and intention that the remedy under it was and would be available in precisely the circumstances in which the Court below has now denied it. The Congressional view and intention in this regard are wholly consistent (which the decision of the Court below is not) with the basic objectives which the Congress sought to attain by the Act, for, as the House Report on the bill which became the Act makes plain, "the purpose of the bill is *not* to create new international rules or practices, but to define and mitigate them". H.R. Rep. 85, 65th Cong., 1st Sess. (1917) 2. The prior international rules and practices in the relevant circumstances, as received and applied by this Court, are clear. Thus,

in *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cran. 191, 195 (1815), this Court made it clear that enemy-occupied territory was "enemy" territory, and its inhabitants "enemies", *only* so long as the enemy occupation continued, saying

> * * * Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every * * * belligerent purpose they are considered as a part of the domain of the conqueror, *so long as he retains the possession and government of them.* The island of Santa Cruz, after its capitulation, remained a British island *until it was restored to Denmark.* [Emphasis supplied][10]

Similarly, in *U.S.* v. *Guillem*, 14 How. 47, 60 (1850), this Court held that a citizen of a neutral country who had resided in an enemy country, ceased to be an enemy when he removed from the enemy country, saying:

> The hostile character which his domicile in Mexico had impressed upon him and his property had * * * been thrown off; and as soon as he sailed from Vera Cruz he resumed the character of a French citizen, and as such was entitled to the rights and privileges of a neutral, in regard to his property, as well as in his person.

See also, *The Venus*, 8 Cran. 253, 280 (1814); *Duguet* v. *Rhinelander*, 2 Johns. Cas. 476, 479 (N.Y. 1802); *The Indian Chief*, 3 C. Rob. 12, 20, 21 (Eng. 1801).

[10] This case is cited in the legal memorandum which is included in the Senate Reports on the bill which became the Act. S.Reps. 111, 113, 65th Cong., 1st Sess. (1917) App. B, p. 18. It is also cited, and this passage from it is quoted with approval by the House of Lords in *Soracht* v. *Van Udens Scheepvaart en Agentuur Maatschappij*, 1943 [A.C.] 203, 223, 230, 241.

The Executive construction of §2(a) has in the past, moreover, consistently followed that of the Congress, i.e., that after the enemy occupation of allied territory has ended, its residents and corporations are no longer enemies without remedy under §9(a). Thus, on May 25, 1918, the Department of State informed the French and Belgian Governments, VI Hackworth, *Digest of International Law* (1943) 206, that the remedy of §9 was available to

> * * * any person whose enemy character had changed * * * by reason of his leaving enemy territory or because the enemy withdrew its armed forces from the place of his residence.

Similarly, it was stated in *Alien Property Custodian Report for 1918* (1919) 8, that the remedy provided by §9 was available to residents of formerly occupied areas

> * * * when a person has lost his enemy character by reason of the enemy forces evacuating the territory of his residence * * *.

See also, pp. 237, 238, *op. cit.*, where the Custodian again expressly recognized that residents of enemy-occupied allied territory could avail themselves of the remedy of §9 when they had

> lost their enemy status through the rolling back of the German Armies which have been in occupation of allied territory * * *.

The respondent's predecessor necessarily adhered to this interpretation when in *Bank of the Philippine Islands* v. *Rogers*, 165 F.Supp. 100 (D.C. 1958), aff'd 281 F.2d 12 (D.C. Cir. 1959), he did not challenge the eligibility of a Philippine corporation to maintain an action under §9(a) to recover property vested

after the Japanese occupation had ended.[11] He necessarily adhered to it also in the January 10, 1953, letter to the petitioner, p. 4, *supra*, for it is inconceivable that he would have denied petitioner access to the administrative processes of §32, and expressly "remitted" the petitioner to the judicial remedy under §9(a), if he had considered the petitioner ineligible to maintain an action under §9(a). He adhered to it, too, when, without making any reference to any issue concerning the petitioner's eligibility to sue under §9(a), he said in Dept. of Justice, *Annual Report for the Office of Alien Property 1958*, p. 64, that the issues in the case were "mainly"

> whether a bona fide and completed gift was made * * * and * * * whether the Heegards are eligible to recover vested property * * * despite the fact that they lived in Germany * * *.[12]

The prior administrative interpretations, coupled with the fact that this is a case of first impression in the forty-five years since the Act was enacted, would clearly indicate that the respondent's position in this case, which the Court below adopted, represents a new departure by the Executive in its interpretation of §2(a).[13] Moreover, in the Bonn Con-

[11] So far as concerns its definition as "enemy" of corporations of enemy-occupied territories, §2(a) does not distinguish between foreign corporations and corporations organized within the United States, i.e., in a place under its jurisdiction. Corporations in the latter category are excluded only from §2(a)'s definition as "enemy" of corporations doing business within enemy territory. App. C, p. a13, *infra*.

[12] On the trial of this action, the nature of the gift, and of the Heegards' presence in Germany would be proper issues.

[13] In *Bank Voor Handel En Scheepvaart v. Kennedy*, 288 F.2d 375 (D.C. Cir. 1961), cert. denied 366 U.S. 962, the property of a Netherlands corporation was vested *during* the enemy's occupation of the Netherlands, and it was held that such property could not be

vention of 1952, TIAS 3425, an agreement was exacted from the Federal Republic of Germany that it would compensate *its own* nationals for property belonging to them which the United States (and others of the wartime United Nations) had confiscated as "enemy".[14] On the other hand, although in the Paris Agreement of 1946, 61 Stat. 3157, TIAS 1655, and in the Brussels Agreement of 1947, TIAS 2230, 2569, the United States and others of the wartime United Nations made detailed arrangements concerning property seized by them as "enemy", neither there nor elsewhere was any agreement made in regard to compensating United Nations' nationals for the confiscation of their property as "enemy" by the United States (or by others of the wartime United Nations). Accordingly, unless it can be assumed that the United States and its wartime allies intended to deal more harshly with residents and corporations of United Nations' territory which the Germans had occupied, than with German corporations and Germans who lived in Germany, it must be concluded that confiscation of the property of residents and corporations of formerly occupied territory was *not* contemplated.

The construction placed upon the Act by the Court below is thus contrary to both the purpose and intent

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recovered despite the subsequent termination of the enemy occupation. Thus, like *Swiss National Insurance Co.* v. *Miller*, *infra*, pp. 31, 32, and *Willenbrock* v. *Rogers*, *infra*, pp. 29-32, *Bank Voor Handel's* holding is merely that if a plaintiff in a §9(a) action *was at the time the property was seized*, in circumstances meeting those used by §2 in defining an "enemy", the action cannot be maintained, notwithstanding any subsequent change in the plaintiff's circumstances.

[14] See, S. Exec. Q&R, 82nd Cong., 2d Sess. (1952) 25, 60; Hearings, H.J. Res. 272, 264, 265, and 268, Subcommittee, H. Committee on Foreign Affairs, 84th Cong., 1st Sess. (1955) 4, 5.

of the Congress as clearly shown by the Act's legislative history, and to its heretofore consistent interpretation by the Executive. Moreover, so far as concerns property of residents and corporations of territories occupied by the enemy, the policy of the Act is not, as the Court below would make it, to aggrandize the United States, but rather to prevent such property from falling into the enemy's hands. The effectuation of the Act's policy in this regard does not require that it be construed as permitting confiscation after the enemy's occupation has ended, and as this Court said in *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945):

> Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes as Holy Trinity Church v. United States, 143 U.S. 457 * * * illustrates.

If allowed to stand, the decision of the Court below will establish as principle under the Act, that so long as a state of war technically exists, or the right to exercise the war powers continues, the President may, in his discretion, seize and *confiscate* all or selected property in the United States, of all or selected residents and corporations of territories, allied or American, which the enemy had occupied at any time during the war, even *after* such territories have long since been liberated from the enemy. Certainly no statute should be so construed in the absence of precise language, and a clear legislative purpose, permitting no other. And, in addition to all others, the constitutional considerations involved point against any such construction. See pp. 33-37, *infra*.

2. The decision of the Court below is in essential conflict with the decision of the Court of Appeals for the Third Circuit in *Willenbrock* v. *Rogers*, 255 F.2d 236 (1958), App. D, pp. a17-a23, *infra*. In *Willenbrock*, the plaintiff sued under Section 9(a) for the return of property that had been seized and vested under the Act in 1947, and also for the return of other property that had similarly been seized and vested in 1950. The plaintiff was resident in Germany at the time of the 1947 seizure, but claimed to have been resident in the United States at all times on and after October 16, 1949, and when the 1950 seizure was made. The Court of Appeals, Third Circuit, held that the plaintiff was ineligible to maintain the action with respect to the property vested in 1947, but could maintain it with respect to the property vested in 1950, if at the time of such vesting she were in fact resident in the United States. In so holding, the Court said, 255 F.2d at 238, 239, App. D, pp. a22-a23, *infra*:

> Assuming that it can be shown that the plaintiff was a resident of Pennsylvania beginning October 16, 1949, the provision of the statute discussed above does not apply to her. The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller, 1925, 267 U.S. 42 * * *
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> * * * *
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> It appears, therefore, that the judgment of the court below must be reversed as to the property included in the first seizure of 1947 but as to that which was taken under the 1950 vesting order, it would appear that the plaintiff is entitled to recover if in fact she no longer was a

resident of Germany when the 1950 order became effective.

But §2(a) of the Act defines as enemy "Any individual * * * of any nationality, resident within the territory (including that occupied by the military * * * forces) of any nation with which the United States is at war * * * and any corporation incorporated within such territory * * *." Accordingly, if, as *Willenbrock* holds, an individual who removes from enemy territory during a war (i.e., while the right to exercise the war powers continued) is not, after such removal, an "enemy", and is eligible to maintain an action under §9(a) for the return of property seized and vested *after* his removal, it necessarily follows that a corporation organized in territory which the enemy has occupied, is not an "enemy" *after* such occupation has been terminated, and may maintain an action under §9(a) to recover property which was seized when such territory was no longer enemy-occupied. Accordingly, although the cases deal with different aspects of the matter, the decision of the Court below, and that of the Third Circuit in *Willenbrock*, are necessarily in conflict, as indeed, the Court below recognized. App. A, p. a5, *infra*.[15]

[15] The decision of the Court below is also in conflict with its own action in *Bank of the Philippine Islands* v. *Rogers*, 281 F.2d 12 (1959), where it considered, without reference to the plaintiff's eligibility to maintain the action, an appeal from a judgment on the merits in an action under §9(a) in which the plaintiff was a Philippine corporation. The Philippines were, of course, no less occupied by the enemy during the war than were the Netherlands, and there is no basis in the Act, or elsewhere, for distinguishing between a Philippine corporation and a Netherlands corporation. See fn. 11, p. 26, *supra*. While in *Bank of the Philippine Islands* the respondent's predecessor did not challenge the plaintiff's eligibility to sue under §9(a), the Court below was, nevertheless, fully competent to remand *sua sponte* with instructions to dismiss for want of jurisdiction, if it had considered the plaintiff ineligible to maintain the action. Cf. *Loomis* v. *Rogers*, 254 F.2d 941 (D.C. Cir. 1958), cert. denied 359 U.S. 928.

Moreover, in reaching their essentially conflicting conclusions, both the Court below and the Third Circuit in *Willenbrock* relied on this Court's decision in *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42 (1925). App. A, p. a5; App. D, p. a22, *infra*; p. 29, *supra*. In *Swiss National*, a Swiss corporation had been doing business within Germany during an earlier period of the war, but did not do so during a later period of the war. After it had ceased doing business within Germany, the Swiss corporation sued under §9(a) to recover property which had been seized while it was doing business within Germany. In addition to the provisions indicated above, §2(a) defines as "enemy"

> Any individual * * * resident within the territory (including that occupied by the military * * * forces) of any nation with which the United States is at war * * * and *any corporation * * * incorporated within any country other than the United States and doing business within such territory.* [Emphasis supplied]

In *Swiss National*, as the opinion of this Court expressly states, it was "admitted *that at the time of the seizure* the plaintiff was doing business in Germany, and was *then* an enemy". 267 U.S. at 44. The plaintiff, however, argued "that because * * * [it] had ceased to do business in Germany *after* the seizure," it was entitled to the recovery of the seized property. 267 U.S. at 44. This Court rejected that contention and held, 267 U.S. at 44, that a "change *like this* could not take away the status *of the seized property* as enemy property". [Emphasis supplied] Thus, what *Swiss National* holds is that property which was vested *while* its owner is in the circum-

stances used in §2(a) in defining "enemy", remains enemy property which cannot be recovered even after the owner is in new and different circumstances. It does *not* hold that property seized *after* such a change in circumstances would be enemy property that the owner could not recover in an action under §9(a).

The single sentence quoted by the Court below from this Court's opinion in *Swiss National*, App. A; p. a5, *infra*, has no relevance when read in its original context. In *Swiss National*, the action was commenced after the formal termination of the state of war, and the plaintiff argued that there then being no war, it could not then be an enemy. In rejecting this fanciful argument, this Court pointed to the provision of §12 of the Act that, "[*a*]*fter* the end of the War any claim of any enemy * * * shall be settled as the Congress may direct", and said, 267 U.S. at 45:

> After the end of the War, there could be no enemy in the sense in which the appellant argues. *The word "enemy," used in Section 12, of course refers to the person who or corporation which fulfilled the definition of an enemy during the war.* [Emphasis supplied]

Obviously, in the context in which they appear in *Swiss National*, the italicized words, which the Court below quoted, are wholly without relevance here. *Swiss National* does not support the Court below. It does support *Willenbrock*.

Willenbrock is consistent with the construction which the legislative history of the Act requires, and with this Court's decisions in *Thirty Hogsheads of Sugar* v. *Boyle*, *U.S.* v. *Guillen* and *The Venus*, p. 24, *supra*. The decision of the Court below is not. This Court should resolve the conflict.

3. Whether under the Fifth Amendment to the United States Constitution property of a corporation organized in allied or American territory subsequently occupied by the enemy during the course of a war, may be taken after the enemy's occupation of such territory has ended, and so long as the state of war, or the right to exercise the war powers, continues, without just compensation being paid therefor, is an important constitutional question which has not been, but should be settled by this Court. There is no question but that the property of an "enemy" may constitutionally be taken without the payment of compensation, i.e., an enemy's property may be confiscated. *U.S. v. Chemical Foundation*, 272 U.S. 1, 11 (1926). On the other hand, it is equally plain that the property of friendly aliens, corporations as well as individuals, is entitled to the protection of the Fifth Amendment. *Russian Volunteer Fleet v. U.S.*, 282 U.S. 481, 489 (1931); and that there is, perforce, a constitutional limitation on the designation of aliens as enemies whose property may be confiscated. Thus, in *Guessefeldt v. McGrath*, 342 U.S. 308, 317-319 (1952) this Court held that there was serious doubt whether the Fifth Amendment permitted the confiscation of property of a citizen of an enemy country permanently residing in the United States, and refused on that ground to construe §39 of the Act as barring such a person from recovering his vested property. It follows *a fortiori* that there is a constitutional limitation on the designation of allied and American citizens and corporations as enemies whose property may be confiscated. As Mr. Justice Frankfurter took the occasion to note in *Korematsu v. U.S.*, 323 U.S. 214, 225 (1944), this Court made it clear in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919), that "The war power of the United States, like its

other powers * * * is subject to applicable constitutional limitations."

The seizure and confiscation of "enemy property" is a practice which antedates the Constitution and is expressly sanctioned by the grant to the Congress in Article I, §8 of the power to "make rules concerning captures on land and water". The principles underlying the practice are clear. Thus, in *Miller* v. *United States*, 11 Wall. 268, 305, 306 (1870), this Court said:

> The confiscation is * * * because of the relation of the property to the opposing belligerent * * * in consequence of its ownership. It is immaterial * * * whether the owner be an alien or a friend, or even a citizen * * * of the power that attempts to appropriate the property. * * * It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. *The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government*, while at the same time it furnishes to that government means for carrying on the war. [Emphasis supplied]

"Hence", this Court concluded, 11 Wall. 306,

> any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

Certainly, by this test, property of residents and corporations of allied or American territories *formerly* occupied by the enemy, is *not*, after the enemy's occupation has been terminated, "a proper subject of confiscation". For, such property is *not* property "which the enemy can use, either by actual appropriation or by the exercise of control over its owner"; nor is it property "which the adherents of the enemy have the power of devoting to the enemy's use". On the contrary, such property is as useless to the enemy, and as completely out of the enemy's power as it was *prior* to the occupation.

While, as the Court below noted, the confiscation of such property would, of course, furnish the United States with "valuable means of supporting its own war efforts", it would not, as the Court below failed to note, "impair [the enemy's] * * * ability to resist" one whit. Contrarywise, such confiscation would serve only further to impair the already impaired ability of a formerly occupied territory to meet its own "heavy responsibilities consequent upon a war".

It must, accordingly, be evident that property of residents and corporations of territories, allied or American, formerly occupied by the enemy, is not, after the occupation has been ended, property which "is a proper subject of confiscation", and that the confiscation of such property can have no reasonable relation to the historic objectives of the practice, other than the enrichment of the United States. The measure of the constitutionality of an act of Congress is that it have a reasonable relation to the achievement of constitutionally legitimate end. *Norman* v. *Balti-*

more & O. R. Co., 294 U.S. 240, 311 (1935). And, if the enrichment of the United States were alone sufficient to justify confiscation, the last clause of the Fifth Amendment would be meaningless in war-time.

It is, moreover, sheer sophistry, if not a mere play on words, to say, as did the Court below, p. 8, *supra*, that to deny the United States the right to confiscate *after* an occupation is over, what it could have confiscated *during* the occupation, "would create a very substantial limitation upon the economies of warfare," and, on that ground to sustain such confiscation as constitutionally permissible. For, the question is not one of "the economies of war", but of economic warfare, and whether it can be waged against residents and corporations of allied and American territory formerly occupied by the enemy because they are so stripped of their rights under the Fifth Amendment by the occupation, that even after the occupation is over, their property may be confiscated.

If the view of the Court below is correct, should Delaware be occupied by the enemy[16] and later liberated during the course of the next war, the property of all the thousands of corporations organized in Delaware could constitutionally be confiscated, even after Delaware's liberation, so long as the right to exercise the war powers continued. The mere statement of the proposition is a demonstration that "the constitutional problem is not imaginary * * *" and invites a construction of the Act, consistent with its language

[16] In World War II, it will be recalled, an invasion and the possible enemy occupation of the West Coast were not unanticipated. *Korematsu* v. *U.S.*, 323 U.S. 214, 223 (1944); *Hirabayashi* v. *U.S.*, 320 U.S. 81, 86, 94 (1943).

and legislative history, which would not have such a consequence. *Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952). If, as this Court said in *Guessefeldt*, "confiscation is not easily to be assumed, and a construction that avoids it" is to be favored in the case of a citizen of an enemy country residing in the United States, it is unthinkable that the Fifth Amendment and the Act should be construed as permitting the confiscation of the property of residents and corporations of allied and American territories, formerly occupied by the enemy, *after* the enemy occupation has been terminated. For, enemy occupation does not alter the *essential* character of the occupied territory, nor that of its inhabitants. See, *Fleming* v. *Page*, 9 How. 603, 614, 615 (1850); *Shanks* v. *Dupont*, 3 Pet. 242, 246 (1830); *Fegerabend* v. *McGrath*, 189 F.2d. 694, 696 (D.C. Cir. 1951). Their association with the enemy is but temporary during the period of occupation, and continues only so long as the occupation itself continues. *U.S.* v. *Rice*, 4 Wheat. 246, 254 (1819); *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cran. 191, 195 (1815); *Drawey* v. *Oaussis*, 188 Misc. 912, 69 N.Y.S. 2d 850, aff'd 272 App. Div. 870, 72 N.Y.S. 2d 262 (1947).

Conclusion

The questions raised by this petition are important federal questions of substance which have not been, but should be settled by this Court. The decision of the Court below is, moreover, in essential conflict with a decision of the Court of Appeals for the Third Circuit, and such conflict should be resolved. The con-

sequences of the decision below are so serious, and are of such a far-reaching character that review thereof by this Court would seem clearly to be in the national interest.

The petition should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16417

N. V. HANDELSBUREAU LA MOLA,
Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided February 1, 1962

Mr. Dinsmore Adams, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Lawrence S. Lesser* was on the brief, for appellant.

Miss Joan T. Berry, Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, *David C. Acheson*, United States Attorney, and *John G. Laughlin, Jr.*, Attorney, Department of Justice, were on the brief, for appellee. *Messrs. Arthur B. Schor* and *Walter T. Nolte*, Attorneys, Department of Justice, also entered appearances for appellee.

Appendix A

Before EDGERTON, PRETTYMAN and FAHY, *Circuit Judges.*

FAHY, *Circuit Judge*: Appellant filed suit in the District Court, relying for jurisdiction upon section 9(a) of the Trading with the Enemy Act,[1] to recover property vested under the Act by appellee's predecessor as Alien Property Custodian.[2] The property consists of assets of appellant which were on deposit in banks in the United States. By the order now on appeal District Judge Walsh granted appellee's motion for summary judgment. We agree that the suit may not be maintained.

One cannot maintain a suit under section 9(a) to recover vested property unless the claimant is "not an enemy or ally of enemy," to quote the language of the section. "Enemy" is defined in section 2 of the Act as follows:

> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.[3]

---

1 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1958).

2 The powers and functions of the Alien Property Custodian were transferred on October 15, 1946, to the Attorney General. Executive Order 9788, 3 C.F.R. 575 (1943-1948).

3 40 Stat. 411 (1917), as amended, 50 U.S.C. App. § 2(a) (1958).

This definition includes a corporation incorporated within any territory which is occupied by a nation with which the United States, at the time of the occupation, "is at war.". Concededly the Netherlands was occupied by military forces of the enemy of the United States during World War II, and concededly also throughout the occupation period appellant was a corporation organized and existing by virtue of the laws of the Netherlands. Appellant accordingly acquired enemy status. It correctly points out, however, that the vesting order was not made until December 15, 1950. It contends that enemy status which bars recovery of property under section 9(a) must be determined as of the time of the vesting order, and that on December 15, 1950, the occupation had ended and hostilities had ceased, with the effect of ridding appellant of its previous enemy status.

We are not in agreement with the above contention. The war had not ended when appellant's property was vested, or until the Joint Resolution of Congress of October 19, 1951.[4] In this Resolution Congress provided that property which had been subject to vesting and seizure prior to January 1, 1947, would continue to be subject to the provisions of the Act. This included appellant's property, for during the occupation which preceded January 1, 1947, that property

[4] In declaring the end of World War II Congress provided that, notwithstanding this resolution . . . any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 . . . or which has heretofore been vested or seized under that Act . . . shall continue to be subject to the provisions of that Act . . . .

65 Stat. 451 (1951), 50 U.S.C. App. note preceding § 1 (1958).

had clearly been subject to vesting and seizure. And it had not lost its status by the ending of hostilities prior to January 1, 1947. *Cf. Feyerabend v. McGrath*, 89 U.S. App. D.C. 33, 35, 189 F.2d 694, 696.

The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation. Property subject thereto during an occupation is available to control of the enemy in aid of its warfare against the United States and its allies. However, actual vesting might not then be possible. For example, the Custodian might not discover the property during the period of enemy occupation or, if discovered during such period, investigation might entail a considerable period of time before a determination is made that the property is owned or controlled by an enemy within the meaning of section 2 and therefore subject to seizure. Its usefulness to the enemy is not thereby obviated. Rather the contrary. Yet to immunize it because for some reason the vesting authority failed to reduce it to possession until hostilities have ceased, or the occupation ended, would leave untouched property which had been available to enemy control. Such immunization would also deprive the United States of valuable means of supporting its own war efforts. Those efforts, and the heavy responsibilities consequent upon a war, persist long after hostilities have ceased and occupied countries have been freed of the enemy.

For reasons thus suggested we think that in the absence of clearer language indicating the necessity for a different construction the enemy status appellant acquired during the occupation continued, insofar as section 9(a) is concerned, to the time of the vesting

order; that is, we think that at that time the end of hostilities and of the occupation of the Netherlands had not removed appellant from the technical enemy status it had acquired during the occupation. *Orme v. Northern Trust Co.*, 410 Ill. 354, 102 N.E.2d 335 (1951), *cert. denied*, 343 U.S. 921. If this is so then appellant was an enemy within the meaning of section 9(a) when it filed the present suit.

Stated in a different manner, the definition of enemy in section 2 of the Act, as one who is "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" or "incorporated within such territory" is not to be construed as referring only to one who at the date of the vesting order is a resident of or chartered by a nation with which the United States "is [still] at war"; rather, it is to be construed as including a person who or corporation which, at the time of the vesting order, is one who has been a resident of an enemy occupied nation during it occupation or was then incorporated under the laws of an occupied territory and resident therein. "The word 'enemy' . . . of course refers to the person who or corporation which fulfilled the definition of an enemy during the war." *Swiss Ins. Co. v. Miller*, 267 U.S. 42, 45. And lending some support to the position we take is *Hauser v. Brownell*, 98 U.S. App. D.C. 239, 234 F.2d 60. And see *Bank Voor Handel En Scheepvaart, N. V. v. Kennedy*, —— U.S. App. D.C. ——, 288 F.2d 375, *cert. denied*, 366 U.S. 962. Compare, however, *Willenbrock v. Rogers*, 255 F.2d 236, 238 (3d Cir. 1958).

Appendix A

It is suggested that the construction of "enemy" we adopt, and which has the result of enabling the United States to retain appellant's property without compensation, raises constitutional doubts under the Fifth Amendment. It is urged, therefore, that we should adopt a more limited construction which would preclude the confiscation of appellant's property. If, however, we are right in the reasons we have advanced in support of the construction we give the Act—that is, the efficacy of this construction in enabling the purposes of the Act to be fulfilled—then the same reasons remove the constitutional doubts. The constitutionality of confiscating enemy property in carrying out the war powers of course is not questioned.[3] A reasonable exercise of this aspect of the war powers permits the United States to reach property located within its borders which was available to or whose owner was under the control of the enemy while resident within occupied territory. To require as a constitutional matter that the property be actually vested during the occupation or before the end of hostilities would create a very substantial limitation upon the economies of warfare.

We are cited to no precedent which holds with appellant's constitutional probings in the circumstances of the present case. The case of *Guessefeldt*

[3] Denying a person recovery of seized and vested property is not a deprivation of property without due process when the claimant is found to be an enemy. "There is no constitutional prohibition against confiscation of enemy properties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 11; *Stoehr* v. *Wallace*, 255 U.S. 239, 245; *Ueberseeische Finanz-Korporation* v. *Brownell*, 133 F. Supp. 615, 620 (D. D.C. 1955), *aff'd sub nom. Von Opel* v. *Brownell*, 100 U.S. App. D.C. 341, 244 F.2d 789, *cert. denied*, 355 U.S. 878. And see *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120-21.

v. *McGrath*, 342 U.S. 308, 318, turned on the construction to be given "resident within". Germany. While the Court points out that "friendly aliens are protected by the Fifth Amendment requirement of just compensation," citing *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, the Court found that the claimant never came within the definition of an enemy. It does not seem to us that this decision requires us to hold that one who concededly acquired, with respect to its property, enemy status during the enemy occupation of the Netherlands, under whose laws it was then incorporated, lost that status, with respect to its property, because the property was not vested while the occupation continued. This would be inconsistent with the purposes of the Act as gathered from its own text and with the congressional intention as expressed in the Joint Resolution of October 19, 1951.

The only reliance for consent of the United States to be sued in this case is section 9(a) of the Act. *Schilling* v. *Rogers*, 363 U.S. 666; *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy, supra*; *Tiedemann* v. *Brownell*, 96 U.S. App. D.C. 9, 222 F.2d 802. Since that section does not cover the case, and this suit is in substance, though not in name, one against the United States to which it has not consented, the District Court properly awarded judgment for appellee. See *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy, supra*. It goes without saying that this carries no possible implication of unfriendliness to the Netherlands. It rests solely on a technical enemy status acquired by appellant under the Trading with the Enemy Act by reason of the enemy occupation of the Netherlands and appellant's incorporation therein.

Appendix A

A further matter is noted. Before filing the instant suit in the District Court under section 9(a) appellant had applied to the Attorney General under the provisions of section 32(a)[6] of the Act for discretionary administrative relief permitted by that section to technical enemies who could not qualify to sue under section 9(a). In response to the application appellee's predecessor advised appellant in writing as follows:

> Enclosed is the Order disallowing the above-numbered claim.
>
> For your information, it is the present practice of this Office, except in cases where a claim is clearly entitled to allowance, to remit the claimant whose right to sue is not barred by lapse of time to his remedy in court and thus avoid the possible delay and expense of a double set of hearings. Such procedure is authorized by an amendment to the Rules of Procedure for Claims of this Office, effective April 16, 1957 . . .
>
> Under the provisions of Section 33 of the Trading with the Enemy Act . . . a timely suit may be instituted under Section 9(a) of the Act for return of the property claimed in the event you are dissatisfied with the administrative action taken on your claim, and the enclosed order of disallowance does not prejudice in any way your right to sue.

On the basis of the foregoing appellant contends that the Government may not in equity and good con-

[6] 60 Stat. 50 (1946), as amended, 50 U.S.C. App. 32 a (1958).

science claim that appellant is ineligible to sue under section 9(a) for any reason other than one which would render it ineligible as a claimant under section 32(a).* But the question before the District Court was one of jurisdiction. Whatever relief, if any, appellant may seek on the basis of the previous disallowance of its application under section 32(a), the District Court was without jurisdiction of the complaint in the present case. In this situation we remand for dismissal of the complaint. *Schilling* v. *Rogers*, *supra*; *Tiedemann* v. *Brownell*, *supra*.

It is so ordered.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1961.

Civil 1238–58

No. 16,417

N. V. HANDELSBUREAU LA MOLA,
Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: EDGERTON, PRETTYMAN and FAHY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby,

vacated, and that this cause be, and it is hereby remanded to the District Court with directions to dismiss the complaint.

Per Circuit Judge Fahy.

Dated: February 1, 1962.

United States Court of Appeals
for the District of Columbia Circuit

Filed Feb 1 1962

Joseph W. Stewart
Clerk

UNITED STATES DISTRICT COURT

For the District of Columbia

Civil Action No. 1238—58

N. V. Handelsbureau La Mola, Plaintiff.

vs.

Robert F. Kennedy, etc., Defendant.

ORDER

This matter comes before the Court for hearing and oral argument on the Defendant's motion for summary judgment, and after consideration of the pleadings, the record, the memoranda of points and

authorities in support of and in opposition to the motion, the affidavits and exhibits and other papers on file in the case, and the Court finding that there are no material issues of fact in existence in the case, and that the Defendant is entitled to judgment as a matter of law, it is this 30th day of March, 1961.

ORDERED, that the motion of the Defendant for summary judgment be, and the same hereby is, granted.

s LEONARD P. WALSH
Leonard P. Walsh, Judge

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For the Defendant

Appendix C

Trading With the Enemy Act, 40 Stat. 411, as amended, §§2(a), 5(b)(1), 7(c) and 9(a), Tit. 50 App. U.S.C. §§2(a), 5(b)(1), 7(c) and 9(a):

SEC. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

SEC. 5. * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

* * * *

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exporta-

tion of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States * * *.

SEC. 7 * * *

(e) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * *

Appendix C

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9:

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution

of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title * * * so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix D

MARIE LOUISE WILLENBROCK

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian,

Appellant.

No. 12394.

United States Court of Appeals
Third Circuit.

Argued March 18, 1958.

Decided April 22, 1958.

Rehearing Denied May 27, 1958.

George B. Searls, Washington, D. C. (Dallas S. Townsend, Asst. Atty. Gen., Harold K. Wood, U. S. Atty., for the Eastern Dist. Pennsylvania, Philadelphia, Pa., Irwin A. Seibel, Marbeth A. Miller, Attys., Dept. of Justice, Washington, D. C., on the brief), for defendant-appellant.

T. Henry Walnut, Philadelphia, Pa., for appellee.

Before GOODRICH, STALEY and HASTIE, Circuit Judges.

GOODRICH, Circuit Judge.

This appeal concerns the application of words in the Trading with the Enemy Act, 50 U.S.C.A. Ap-

pendix, §§ 1-40. The plaintiff brought suit, under Section 9(a) of the Act, to recover certain property which had belonged to her and which was vested by orders of the Alien Property Custodian in 1947 and 1950. The district judge entered judgment in her favor. Willenbrock v. Brownell, D.C.E.D.Pa. 1957, 152 F.Supp. 351, and the Attorney General Successor to the Alien Property Custodian,[1] appeals.

The significant facts are few. Miss Willenbrock was German born. She was naturalized in this country in 1928. In 1932, while in France, employed as a governess by an American employer, she went back to Germany to take care of her father and remained in Germany after his death in 1933. Except for eight months she was in Germany from 1932 to 1949. She inherited some property and lived off the income therefrom until the premises were destroyed by a bomb during the war. She lost her first naturalization for reasons not necessary to go into here and was again naturalized in 1955. The plaintiff's state of mind is summed up by the trial judge in saying that "she never wanted to be considered a German citizen or resident, that she desired to be, at all times, an American citizen and to return to the United States to live when it appeared to her to be possible to do so without sacrificing her German property interests."

Section 9(a) permits suit in the district court by "any person not an enemy" as defined in Section 2(a) of the statute. The question to be decided, there-

[1] Pursuant to Exec. Order No. 9788, 3 C.F.R. 169 (1943-48 comp.), 50 U.S.C.A. Appendix, § 6 note.

fore, is the very narrow one whether the plaintiff is included within the statutory exclusion. It does not, however, turn upon finding that Miss Willenbrock was or was not an "enemy" of the United States in any literal sense. No one suggests that she was in any way disloyal to her adopted country. The problem is a technical one concerning the interpretation of the language in Section 2(a). There enemy is defined, inter alia, as "any individual * * * resident within the territory * * * of any nation with which the United States is at war."

During the war was the plaintiff "resident" in Germany? The words "resident" and "residence" have no precise legal meaning although they are favorite words of legislators. Sometimes they mean domicile plus physical presence; sometimes they mean domicile; sometimes they mean something less than domicile. All this is well established and the general statement would not be quarreled with.[2] We think the learned district judge in this case inclined to treat the term as though "residence" in the statute involved domicile. If the issue were domicile a good case could be made for finding that the plaintiff did not become domiciled in Germany because she always intended to return to the United States when she could do so without sacrificing her property interests. Cf. Dupuy v. Wurtz, 1873, 53 N.Y. 556.

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[2] See McGrath v. Kristensen, 1950, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173; United States v. Stabler, 3 Cir., 1948, 169 F.2d 995; Goodrich, Conflict of Laws 50-51 (3d ed. 1949); Beale, Residence and Domicile, 4 Iowa Law Bull. 3 (1918); Reese & Green, That Elusive Word, "Residence," 6 Vand.L.Rev. 561 (1953); Restatement, Conflict of Laws 2d, § 9, com. j (Tent. Draft No. 2, 1954).

Appendix D.

We think, however, the authority which controls us here is Guessefeldt v. McGrath, 1951, 342 U.S. 308, 72 S.Ct. 338, 341, 96 L.Ed. 342. While the members of the Supreme Court differed as to one of the points in the case, they did not disagree with Mr. Justice Frankfurter's description of the content of "residence." Backed up by the legislative history the Court said: "'resident within' enemy territory implies something more than mere physical presence and something less than domicile."

If the term means something less than domicile we are quite clear that this plaintiff was resident in Germany. The length of time she was there is certainly indicative. One may, perhaps, stay in a place for seventeen years without becoming domiciled there; surely it is hard to think of a person staying that long without becoming a resident. Seventeen years is no temporary sojourn by any test. Furthermore, the plaintiff was not constrained to stay in Germany. See Guessefeldt v. McGrath, supra; United States v. Stabler, 3 Cir., 1948, 169 F.2d 995. The fact that one stays in a place by reason of economic desirability does not prevent the acquisition of a domicile there,[3] much less should it prevent one's being a resident.

Our conclusion that plaintiff was resident in Germany is supported by Brownell v. Oehmichen, 100 U.S.App.D.C. 214, 243 F.2d 637, certiorari denied, 1957, 355 U.S. 842, 78 S.Ct. 49, 2 L.Ed.2d 1. There is some trouble with Kaku Nagano v. McGrath, 7 Cir., 1951, 187 F.2d 759, affirmed per curiam by an

[3] See 1 Beale, Conflict of Laws § 22.1 (1935); Goodrich, Conflict of Laws § 29 (3d ed. 1949).

equally divided Court, 1952, 342 U.S. 916, 72 S.Ct. 363, 96 L.Ed. 685. Perhaps it can be explained, as the Government suggests, by the allegation of Mrs. Nagano that she was compelled to stay with her children in Japan.[4] Be that as it may, we think that the Guessefeldt case cited above gives us our mandate here.

There is a further element in this case, however, which was not brought to the notice of the court by counsel for either party. It was mentioned that there are two vesting orders. One was in 1947 (No. 9925, 12 Fed.Reg. 6797), and the other was in 1950 (No. 16340, 16 Fed.Reg. 107). The 1947 order had to do, according to an exhibit in the case, with the savings account which plaintiff had with the Girard Trust Company of Philadelphia. The vesting order does not say how much is involved but the judgment of the court indicates that it is $1,769.91. What has been said above with regard to "residence" applies to this order because plaintiff was a resident of Germany at the time.

Now the second vesting order bears date 1950. It has to do with ten shares of Pennsylvania Railroad stock and two declarations of trust certificates issued by City Bank Farmers Trust Company of New York. The value of the property in this seizure according to the judgment in the court below is $6,500. The complaint in this case says that the plaintiff returned to the United States October 16, 1949 and took up her residence in the Eastern District of Pennsylvania.

[4] When the case came back after remand, the "law of the case" doctrine was heavily emphasized in the court's opinion. Kaku Nagano v. Brownell, 7 Cir., 1954, 212 F.2d 262.

The answer is an enigmatic one because it denies the allegation of this particular paragraph to the effect the plaintiff was a nonenemy. There is no finding of fact on the subject.

Assuming that it can be shown that the plaintiff was a resident of Pennsylvania beginning October 16, 1949, the provision of the statute discussed above does not apply to her. The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller, 1925, 267 U.S. 42, 45 S.Ct. 213, 69 L.Ed. 504; Rudenberg v. Clark, D.C.D.Mass. 1947, 72 F.Supp. 381, 383.

One more point is to be noticed. Following the description of the property in the second paragraph of the vesting order there is a clause saying:

"* * * hereby determined:

"3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany)."

Then there is a line drawn to some fine print below which says:

"all determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest * * *"

However, this portion of the order seems not to be relevant to our case. The language of the Executive

Order 9193, July 6, 1942, 50 U.S.C.A.Appendix, §6 note, excludes from the category of that which may be seized "* * * credit instruments * * * and securities" except to the extent that the Alien Property Custodian determines that the inclusion of these items is necessary. We have no record of any such determination by him.

It appears, therefore, that the judgment of the court below must be reversed as to the property included in the first seizure of 1947 but as to that which was taken under the 1950 vesting order, it would appear that the plaintiff is entitled to recover if in fact she no longer was a resident of Germany when the 1950 order became effective.